No. (1)

Supreme Court, U.S.
FILED

IN THE 99 819 OCT 12 1999

Supreme Court of the United States

RUBY HOWARD,

Petitioner,

-against-

THE NEW YORK TIMES COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

PETITION FOR WRIT OF CERTIORARI

RUBY HOWARD
Petitioner Pro se
P.O. Box 8336
New York, NY 10116
(212) 802-8269

THE REPORTER COMPANY, *Printers and Publishers, Inc.*
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QUESTION PRESENTED

Whether a federal district court in complete disregard of the limits of federal jurisdiction previously established by the United States Supreme Court can affirm dismissal of an action that references federal statutes which the court does not uphold. 28 U.S.C . 1331 (Federal Question) provides

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

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No_____

IN THE
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RUBY HOWARD,

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THE NEW YORK TIMES COMPANY,

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ON PETITION FOR A WRIT OF
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FOR THE SOUTHERN DISTRICT OF NEW YORK

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Second Circuit entered on July 29. 1999 is not published. The Opinion of United States District Court Southern District of New York July 23, 1998. Opinion of United States District Court Southern District of New York March 27, 1987.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered June 1, 1999. The Court of Appeals denied a timely petition for rehearing on July 29, 1999.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides in part

"No person shall...be deprived of life, liberty or property, without due process of law..."

The First Amendment of the Constitution of the United States provides in part

"Religious establishment...

Freedom of Speech..."

STATEMENT OF THE CASE

The fundamental question in this case is whether a district court in complete disregard for the law loses its objectivity thereby causing justice to be derailed. In the opinion of this Court "No state law or act can prevail in the face of contrary federal law, and the federal court must search out the fact and truth of any proceeding or transaction to determine if the Constitution has been violated." *Presbyterian Church in United States v. Hull Church*, 393 US 440, 89 S. Ct. 601, 21L.Ed 2d 658 (1969); *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S. Ct.710,11 L. Ed. 2d 686 (1964).

A. Factual Background

The Second Circuit Court of Appeals erred in affirming on July 29, 1999, District Court for the Southern District of New York Chief Judge Thomas Greisa's Judgment of July 23, 1998, because the district court felt documents submitted to substantiate claim "lack adequate basis in either law or fact" to warrant re-opening of Discrimination suit, although that court granted forma pauperis for petitioner to proceed. The case grew out of a permanent disability petitioner suffered in Feb, 1985 by employer who conspired with company's

Medical Director to deliberately inflict injury to her right knee while she was recuperating from major scoliosis spinal surgery with insertion of Harrington Rod. Petitioner submitted employer memo of Jan 24, 1985, to Medical Director deliberately misrepresenting her job activities, work habits and questioned company's impending risk of having "ill" employee at work. It was that memo Medical Director testified at Workers' Compensation hearing that led to his seeking unnecessary and reckless reflex of right knee resulting in injury. Petitioner suffered meniscus tear and damage to sciatic nerve and now requires full knee replacement. Court of Appeals Summary Order ruling of time barred should be rescinded because although injury occurred before the Americans with Disabilities Act was passed, injury has been ongoing since 1985.

In 1986 when the case originated, petitioner was denied due process by The Times attorney John J. Stanton in his refusal to supply petitioner with copies of briefs and other legal documents he submitted to the Federal District Court, thereby thwarting petitioner's fundamental right to respond and defend against employer allegations.

On deadline set for receiving briefs, attorney John Stanton's office delivered two to three bulky Arbitration Transcripts to petitioner's home via messenger service, at one minute before midnight. No briefs or other legal documents accompanied transcripts. Defendant fraudulently concealed these documents by offering transcripts to throw petitioner off guard.

Petitioner telephoned Judge Goettel's chamber about 9:00 a.m. the next day to complain about not receiving Defendant's brief except for the bulky transcripts. No suggestion was given how to handle the matter except it would be brought to the judge's attention. Petitioner was unaware about filing

affidavit with regard to complaint. But for the court not to be cognizant of this problem when defendant's charges go unchallenged is incomprehensible.

Attorney John Stanton and his associate Patricia Dobberstein deliberately filed false affidavits to the court stipulating legal documents were mailed to petitioner's home. Nothing was ever received by mail to petitioner's home from Defendant, except Arbitration transcripts that were hand-delivered by messenger. Defendant's intent and purpose was to fraudulently deceive petitioner and the court.

The Times presented false and convoluted memoranda defaming petitioner's character and job performance. Defendant contends Petitioner had disciplinary problems and was rude and insubordinate to her superior. That behavior is out of character. Petitioner was singled out in a department of 40 to 50 employees of which only 4 including petitioner were minorities, to receive vicious memos, constant suspension and threatened dismissal by men who were instigating these offenses. Office authority resides with department heads, so why would an ordinary worker be asinine enough to want to usurp that authority. Petitioner was promoted to an indexing position for meritorious work, but weeks after training began job was switched to co-worker whose performance was below par. Petitioner filed complaint with the Human Rights Commission but it was dismissed after the Index Department fraudulently falsified co-worker's abstracts by presenting someone else's work in lieu of co-worker's to the Commission, resulting in dismissal of complaint and opening the door for reprisal. Two white co-workers were promoted in a similar manner without fanfare. (Petitioner can prove unequivocally that record was altered).

On Nov 1, 1983 petitioner became overwrought by employer's daily harassment and humiliation, replied to The

Times charges by refuting their version of events. The Times went into denial and chided petitioner for making "scurrilous" remark. To reveal employer's little secret of falsifying the record sent to the Commission and having that fact totally ignored by the court is disconcerting.

Judge Goettel's Summary Judgment states that petitioner attended all the Arbitration proceedings and witnessed The Times' attorney Stanton handing over memos describing her disciplinary problems to her attorney and offered no objection, is in gross error. Petitioner was only invited to attend the 1st proceeding in which she testified. At no time did petitioner witness any such exchange between attorneys. Defendant's fraudulent act of concealing his misleading story from petitioner and urging the court into summary judgment is subornation of perjury.

Petitioner's Job Performance Review was "outstanding," yet the false, convoluted memos told another story and the court found no disparity there. Petitioner learned she became index clerk when she received job review.

Petitioner who was still recuperating from scoliosis spinal surgery in January 1985 and wearing a complete back brace was ordered to lift and transport over 100 lbs. of computer printouts, despite her surgeon's warning against heavy lifting. Employer, with malice aforethought conspired with Medical Director to deliberately inflict harm to her person by trying to get reflex of right knee which was impossible because bone graft to right pelvis which was unhealed caused muscles to atrophy and vulnerable to injury. Yet the court in its infinite wisdom felt her dismissal in 1985 was justifiable, giving no consideration to the fact that disciplinary actions were taken mainly during petitioner's recuperation which would make infractions humanly impossible to achieve. Contrary to defendant's allegation of meeting with Petitioner prior to

dismissal, no such meeting occurred. Petitioner was told she was "fired," and to leave building immediately. Therefore her due process rights were denied. (*Goldberg v. Kelly*, 397 (1970) hearing required before termination of welfare benefits).

EEOC issued a Right to Sue Letter but never contacted Petitioner at any time regarding its investigation and petitioner never filed complaint with institution.

The court questioned Petitioner's complaint of "bad reference" received from employer in a Nov. 1976 memo,[1] after she had filed complaint with the Human Rights Commission which prevented her from being transferred to other departments. But cajoled by Defendant, the court was persuaded to change its thinking. If equal justice under the law is to be relevant, facts should be weighed upon the preponderance of evidence and not be influenced by one side. Title VII of the Civil Rights Act of 1964 states that it is incumbent upon employer to provide a healthy work environment. How such an environment breeds insidious charges boggles the mind.

Petitioner appealed Judge Goettel's Summary Judgment to the Court of Appeals, but unknown to petitioner her documents landed in Goettel's White Plains court. Judge Goettel issued an order denying appeal on the basis of time barred and other false affidavits submitted by attorney Stanton, who

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[1] As acting supervisor in Information Bank for several weeks in mid 1976 petitioner reported to Index Dept. Mgr., whom she had just met. Impressed with her expertise, he invited her to become indexer. When Info Bank became fully automated weeks later co-worker Cody joined her. During training Cody was given routine stories such as Births, Deaths, Marriages, while petitioner covered intl and political stories.

again refused to make copies of his legal documents available to Petitioner, violating her due process rights.

Petitioner made a final attempt to appeal to the Court of Appeals only to have this attempt blocked by Stanton who sought and received a dismissal. It seems appropriate to state here that Stanton sought to suppress the truth by weaving a web of lies, which unfortunately the court accepted.

B. The Proceedings Below

In 1986 after unsuccessful Arbitration proceedings, Petitioner filed claim in the Federal District Court for the Southern District. Attorney John Stanton who represented defendant did everything humanly possible to abuse and obstruct justice. Petitioner who brought suit in good faith had no notion about Stanton's scheming intention. On deadline set for submitting briefs to the court, Defendant delivered to Petitioner's home via messenger service two-three bulky Arbitration transcripts at one minute before midnight. No briefs accompanied transcripts. Petitioner, who was seeing transcripts for the first time was shocked to discover the absence of briefs which left no room for response to Defendant's charges and aspect of transcripts that were submitted. Petitioner telephoned the Judge's chamber the next day to inquire and complain about oversight. She was advised the matter would be brought to the judge's attention.

Being inexperienced about the rudiments of the law, Petitioner was unsure of what next to do. Months later when the court's decision was issued, Stanton's evasive actions were clear. His reason for keeping petitioner away from the Arbitration proceedings, except the one in which she gave

limited testimony was to enable him to mislead and distort the facts.[2]

Petitioner filed an appeal in the Court of Appeals and received a form requesting whether she wanted to have hearing in White Plains to which she replied "no." Nonetheless, appeal ended up in Goettel's White Plains office unknown to Petitioner. Although appeal was timely in Manhattan, it was dismissed "time barred." That decision recently plagued Petitioner when Court of Appeals affirmed district court's dismissal. Further appeals did not materialize because they were blocked by Stanton. Defendant finally motioned the court to dismiss claim without notifying Petitioner.

In 1998, Plaintiff again reopened case in District Court mainly because disability of 1985 worsened. That claim was dismissed by Chief Judge Greisa and an appeal to the Court of Appeals affirmed dismissal. Plaintiff appealed ruling by introducing newly found evidence from Federal Archives, but that was denied.

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[2] Petitioner joined The Times in 1969 as Research Secy in Editorial Department. Went to Information Bank in Dec,'72 as Copy checker and trained employees and acted as supervisor. She trained co-worker who got job in her stead and temporary typist Phyllis Collazo in Index Dept who became her immediate supervisor. Mgrs. used firings as ploy to have them reduced to weeks of suspension thereby causing plaintiff financial grief. In Sept.1981, dept promised to reinstate petitioner to indexer but when she returned from taking young son to college, promise was reneged upon and petitioner accused of wrongdoing, "fired". Decision took 3 weeks for plaintiff's return; April 1984, days before admitted to hospital, plaintiff "fired" for alleged charges, took 2 weeks to correct; Oct 1984 "fired" while recuperating, took 2 weeks to return, pattern is clear with trumped-up charges. Petitioner has advance degree and would not demean herself for anyone. Mgrs. transferred their unscrupulous behavior to petitioner as such behavior is believable in court and society at large. Petitioner was 1st person of color to work in Editorial dept. (Petitioner had surgery on May, 1984 and returned to work in August 1984).

REASONS FOR GRANTING THE WRIT

I. The Petition Should Be Granted Since The Opinion Below Defies and Exceeds The Limits of Federal Question Jurisdiction Previously Established By This Court in *The New York Times Co. v. Sullivan* and *Bennett v. United States Lines.*

In District Court claim of 1998, Plaintiff argued Defendant deliberately sent misleading memo to Medical Director which resulted in harm to her person. Memo was not revealed to plaintiff until a 1990 hearing at the Workers' Compensation Board when Medical Director presented memo of Jan 24, 1985, stating that memo from Petitioner's department prompted him into unnecessary and reckless examination of her knee. Therefore District Court's contention that doctrine of equitable tolling cannot save Plaintiff's claim of discrimination because that doctrine only "prevents the running of a statute of limitations against Plaintiff who is unaware that he (or she) has a cause of action because of the Defendant's fraudulent acts of concealment" is moot. *Bennett v. United States Lines*, 64 F 3d 62, 66 (2nd Cir. 1995). Although harm occurred in 1985, plaintiff was not aware of extent of injury until years later when injury worsened. She also had no knowledge that accident was a deliberate preconceived notion by defendant.

The District Court by allowing itself to be manipulated by Respondent in 1986, failed "to search out the fact and truth" in this proceeding and therefore could not exercise jurisdiction to determine if the Constitution had been violated. Case in point: Petitioner who filed suit was deliberately barred from participation by Respondent. Therefore it stands to reason that no objective adjudication could have taken place in light of the fact she was not only unaware of its goings on but had no voice in the matter. Clearly, not only was her due process right

thwarted but her First Amendment right to free speech was muffled.

II. The Petition Should Be Granted Because The Supreme Court Must Exercise Its Supervisory Power When a Federal Court Departs So Far From The Usual Judicial Process That It Affirms An Abuse Of Jurisdiction That Denies And Violates Due Process Rights, Undermines Congressional Intent And Obstructs Justice. Fifth Amendment to the Constitution:

> "No person shall...be deprived of life, liberty or property without due process of law..."

Because this Court is the conscience for interpreting the Constitution and its relationship to society, the Supreme Court has to exercise its judicial authority from time to time to ensure that the scale of justice is well-balanced so that fairness, equity and comity remain the common bonds that make our Constitution whole.

Petitioner seeks review in the public interest because if Goettel's decision is allowed to stand, it will only encourage further abuse of a system whereby a federal court can be defrauded into issuing or affirming an order despite the lack of jurisdiction, and denial and violation of due process rights without having to ever substantiate its jurisdiction or explain itself. And how could affidavits be taken truthfully and seriously when someone who should have great reverence for the law finds it so easily to defraud it.

III. The Petition Should Be Granted In The Public Interest Of Other United States Citizens Who Stand To Be Similarly Harmed By Federal Courts that Abuse Jurisdiction And Deny And Violate Fundamental Due Process Rights.

Petitioner hopes and prays that Petition is granted in the public interest so that all persons who stand to be similarly harmed as Plaintiff has been in this case be given some remedy. This injustice should never be allowed to repeat itself.

When this case began in 1986, defendant abused the court by submitting misleading and false documents to the federal court without exercising any sense of responsibility and fairness, while Petitioner who brought claim was not given any benefit of the doubt. How could the court be so lax in allowing defendant so much access while denying plaintiff fundamental rights. Why were those rights trampled upon and not respected when documents of appeal surreptitiously ended up in Goettel's White Plains court after offer was rejected. That decision was not only bias, but arrogant.

In 1215, King John was forced into signing the Magna Charta from which this country's great Constitution was derived, which provides for equity in the law for all its citizens. If those rights are not exercised, our democracy would be faced with chaos. Therefore it is incumbent upon our legal institutions to enforce the law equitably so that the integrity of these institutions are maintained and not compromised.

CONCLUSION

Ideally, the Fifth Amendment was framed to keep our country and its citizens in checks and balances. When a federal court lacks the jurisdiction to do so, that trust and sanctity in government and its institutions erodes. To prevent that erosion, this Court is called upon to stem the tide by bringing some sanity to all of the madness.

Accordingly, Petitioner respectfully requests that Writ of Certiorari be granted and seek punitive and compensatory damages.

Respectfully submitted on this 30th day of September, 1999.

Mrs Ruby Howard

MRS. RUBY HOWARD
Pro Se

Unpublished Opinion, United States Court of Appeals For the Second Circuit, July 29, 1999

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse , Foley Square, in the City of New York, on the 1st day of June one thousand nine hundred and ninety-nine.

PRESENT: HONORABLE THOMAS J. MESKILL,
HONORABLE FRED I. PARKER,
HONORABLE SONIA SOTOMAYOR,
Circuit Judges,

United States Court of Appeals
Second Circuit
Filed: June 1, 1999
Karen Greve Milton, Acting Clerk

RUBY HOWARD,

Plaintiff-Appellant,

v.

THE NEW YORK TIMES COMPANY, INC.,
No. 98-9237

Defendant-Appellee.

APPEARING FOR APPELLANT:
Ruby Howard, *Pro Se*, Cliffwood, NJ

APPEARING FOR APPELLEE:
Adam LIPTAK, New York, NY

Appeal from the United States District Court for the Southern District of New York (Thomas P. Griesa, Chief Judge).

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the district court is AFFIRMED.

Ruby Howard, *pro se*, appeals from a July 23, 1998 judgment dismissing, *sua sponte*, Howard's action against defendant-appellee The New York Times Company, Inc. (the "Times"). Howard filed suit under Title VII of the Civil Rights Act, 42 U.S.C. §2000e *et seq.* and the Americans with Disabilities Act ("ADA"), 42 U.S.C. §12101 *et seq.* Howard claimed that the Times had discriminated against her on the basis of her race, color, and disability. At the time she filed her complaint, Howard

requested to proceed in forma pauperis. The district court granted that motion, but simultaneously dismissed her complaint for failure to state a claim, pursuant to 28 U.S.C. §1915(e) (2) (B) (ii).

We review such dismissals *de novo*. *See Dory v. Ryan*, 999 F.2d 679, 681 (2d Cir. 1993), modified on other grounds on reh'g, 25 F. 3d 81 (2d Cir. 1994). A review of the record establishes that the district court properly dismissed Howard's ADA claims. Because the last possible act of discrimination asserted by Howard, her 1985 termination, occurred seven years before the enactment of the ADA, her ADA claims fail. *See Smith v. United Parcel Service of America, Inc.*, 65 F.3d 266, 266 (2d Cir. 1995)(noting that the ADA, which became effective on July 26, 1992, is not retroactive).

As for Howard's Title VII claims, the district court correctly held that they are precluded under *res judicata* by *Howard v. Holmes*, 656 F. Supp. 1144 (S.D.N.Y. 1987), an earlier case that resolved the issues presently raised by Howard against her and in favor of the Times. The district court was also correct that Howard's Title VII claims are, in any event, time barred because Howard failed to meet the filing requirements of Title VII. *See* 42 U.S.C. §2000e-5.

We have carefully considered Howard's remaining arguments on appeal and find them meritless.

Accordingly, the judgment of district court is AFFIRMED.

FOR THE COURT:

Karen Greve Milton, Acting Clerk
by: Lucille Carr, Deputy Clerk

Issued As Mandate: July 29, 1999

Order of Dismissal, United States District Court For Southern District of New York, July 23, 1998

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RUBY HOWARD,

Plaintiff,

ORDER OF DISMISSAL

-against-

THE NEW YORK TIMES,

Defendant.

Plaintiff, *pro se*, brings this action pursuant to Title VII of the Civil Rights Act of 1964, as codified, 42 U.S.C. §§ 2000e to 2000e-17, and the Americans with Disabilities Act of 1990 (the "ADA"), as codified, 42 U.S.C. §§12112 to 12117. Plaintiff alleges that in 1985 defendant discriminated against her by failing to promote her, failing to accommodate her disability, retaliating against her and terminating her employment. Plaintiff seeks unspecified damages. For the following reasons, the complaint must be dismissed in its entirety.

Title VII contains a filing requirement similar to a statute of limitations. The statute provides that a charge:

> shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred..., except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice...such charge shall be filed by or on behalf of the person

aggrieved within three hundred days after the alleged unlawful employment practice occurred.

42 U.S.C. § 2000-5(e)(1).[1] In deferral states like New York which have an agency with authority to address charges of employment discrimination,[2] the statute of limitations for filing a charge with the EEOC or the local agency is 300 days from the date after the last "alleged unlawful employment practice occurred."*Carrasco v. New York City Off-Track Betting Corp.* 858 F.Supp. 28, 31 (S.D.N.Y. 1994); 42 U.S.C. § 2000e-5(e)(1). Because the unlawful employment practices plaintiff alleges occurred in 1985, plaintiff was required to file her charge with the EEOC or the local New York agency many years ago.[3]

Although plaintiff has recently made efforts to follow the required procedures, those efforts do not save her complaint. Despite the fact that plaintiff obtained a letter from the EEOC- -which she attaches to her complaint--that letter, dated January 9, 1998, dismisses plaintiff's discrimination claim as time-barred because "the harm [she is] alleging occurred over 300 days ago". *See* plaintiff's exhibit "V". Therefore, because plaintiff did not file a claim with the EEOC within the required 300 day period after her termination, her Title VII and ADA claims are barred by the statute of limitation and must be dismissed. *See e.g. Butts v. City of New York Dep't of Housing*

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[1] The ADA has the identical 180/300 day filing requirement. *See e.g. Lloret v. Lockwood Greene Engineers, Inc.*, 1998 WL 142326 (S.D.N.Y. March 27, 1998) (in New York, "[t]o sustain a claim of unlawful discrimination under the ADA..., a complainant must file a claim with the EEOC within 300 days of the alleged act.")

[2] New York City's agency is the New York City Commission on Human Rights ("NYCHR"); New York State's agency is the State Division of Human Rights ("SDHR").

[3] Plaintiff states that in 1985 she "filed a complaint with the Human Rights Commission...and lost my case." *See* plaintiff's exhibit "V".

Preserv. And Devel., 990 F.2d 1397, 1401 (2d Cir. 1993) (upholding dismissal of Title VII claim where plaintiff had not filed charge with the EEOC within 300 day period); *Conner v. National Health Laboratories, Inc.*, 1996 WL 457307 (S.D.N.Y. Aug. 13, 1996) (dismissing plaintiff's Title VII claim because it was filed with the EEOC seventeen months past the 300 day period). *See also Lloret*, 1998 WL 142326 at, *2 (dismissing *pro se* plaintiff's ADA claim as not timely because plaintiff filed charge with the EEOC more than 300 days after alleged discriminatory act).

Finally, the doctrine of equitable tolling cannot save plaintiff's claims of discrimination because that doctrine only "prevents the running of a statute of limitations against the plaintiff who is unaware that he [or she] has a cause of action because of the defendant's fraudulent acts of concealment." *Bennett v. United States Lines*, 64 F.3d 62, 66 (2d Cir. 1995). Here, plaintiff claims to have filed charges against defendant in 1985. Thus, plaintiff was clearly aware of the acts she perceived to be discriminatory and she has alleged no circumstances warranting equitable tolling of the limitations period.

Accordingly, the complaint, filed in *forma pauperis* under 28 U.S.C. § 1915(a)(1), is dismissed pursuant to 28 U.S.C. § 1915(e)(2) as it "lacks an adequate basis in either law or in fact." *Neitzke v. Williams*, 490 U.S. 319, 325 (1989). We certify pursuant to 28 U.S.C. § 1915(a) that any appeal from this order would not be taken in good faith. *See Coppedge v. United States*, 369 U.S. 438, 444-45 (1962).

SO ORDERED

Thomas P. Griesa
Chief Judge

Dated: July 23, 1998
New York, New York

Memorandum of Opinion, United States District Court For Southern District of New York , March 27, 1987...fdc3

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RUBY HOWARD,

Plaintiff,

86 Civ. 0913 (GLG)

-against-

OPINION

HARVEY HOLMES
C/O The New York Times,

Defendant.

APPEARANCES:

RUBY HOWARD
Plaintiff pro se
184 Bethany Road
Hazlet, New Jersey 07730

CAHILL GORDON & REINDEL, P.C.
Attorneys for Defendant
80 Pine Street
New York, New York 10005
Of Counsel:

H. Richard Schumacher, Esq.
John J. Stanton, Esq.
Patricia Dobberstein, Esq.

and

Marcijane Kraft, Esq.
Labor Counsel
The New York Times Company
229 West 43rd Street
New York, New York 10036

Plaintiff Ruby Howard was employed by The New York Times ("The Times") from 1969 until she was discharged in 1985. She brings this action against Harvey Holmes, a department manager at The Times, alleging discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e (1982). The Times[4] moves for judgment on the pleadings or, alternatively, for summary judgment.

Background

In 1969, the plaintiff began working for The Times as a secretary in the Editorial Department. She remained in that position until November 1972, when she applied for and received a transfer to the Index Department, first as a secretary and later as a copy checker. In 1975, the plaintiff and two other employees were given an opportunity to try out for the higher paying position of assistant indexer. The plaintiff was unsuccessful, and resumed her position as a copy checker. Shortly thereafter, the plaintiff filed charges with the New York

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[4] The complaint filed with the EEOC, for which a Right to Sue Letter was issued, names both the New York Times and Harvey Holmes as respondents. The judicial complaint names the defendant as "Harvey Holmes c/o The New York Times." The Times, however, as the "employer" pursuant to 42 U.S.C. §2000e(b) (1982), is the actual defendant.

City Commission on Human Rights ("CCHR") and the federal Equal Employment Opportunity Commission ("EEOC") alleging that The Times had refused to promote her to the assistant indexer position because of her race and color.

The CCHR investigated the charges, and dismissed them as baseless in early 1976. The plaintiff pursued an appeal within the CCHR, but was unsuccessful. The EEOC reviewed the CCHR findings and issued a "Determination" that there was no reasonable cause to believe the plaintiff's charges were true. The EEOC advised the plaintiff that she was entitled to receive a Right to Sue Letter,[5] which was issued to her. However, the plaintiff did not initiate a civil action at that time.

The plaintiff continued to work as a copy checker until December 1977, when The Times eliminated that position, replacing it with automated procedures. The Times, however, offered the plaintiff a position as an index clerk, which she accepted. This is normally a lower-salaried position than that of copy checker. But, pursuant to the collective bargaining agreement between The Times and The Newspaper Guild ("The Guild"), the plaintiff continued to receive her former salary and benefits.

Beginning in September 1981, and continuing for the next several years, the plaintiff was given numerous disciplinary warnings and at least two periods of suspension for insubordinate behavior. On December 19, 1984, the plaintiff again filed charges with the EEOC and CCHR. This time she

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[5] A Right to Sue Letter is a prerequisite to filing a judicial complaint in federal district court. If a charge filed with the EEOC is dismissed, or if, within 180 days from the date of filing, the EEOC fails to take action in it, the claimant may request a Right to Sue Letter from the EEOC. If suit is not brought within 90 days of receipt of a Notice of Right to Sue, the right to bring an action is lost. 42 U.S.C. § 2000e-5(f) (I) (1982).

alleged she was being disciplined in retaliation for the racial discrimination charges she filed against The Times in 1975. She specified the following actions as the basis for her retaliatory discrimination claim: (1) The Times' continuing refusal since 1975 to promote her to the position of assistant indexer; (2) her "demotion" to index clerk in 1977; (3) a bad reference allegedly given by The Times on an unspecified date; (4) a disciplinary memorandum from plaintiff's supervisor dated October 13, 1984, warning her about work performance; and, (5) a two-week disciplinary suspension of plaintiff, which began on October 16, 1984.

On August 6, 1985, the plaintiff's employment at The Times was terminated for "gross insubordination." Soon thereafter, the plaintiff sought relief pursuant to the grievance/arbitration procedure of the Times-Guild collective bargaining agreement. Additionally, at the request of the plaintiff, the EEOC issued a Right to Sue Letter on November 4, 1985.[6] The plaintiff filed this action in January 1986. The judicial complaint reiterates the five allegations filed with the CCHR and the EEOC. It also alleges that her termination in August 1985 was in retaliation for the earlier charges of racial discrimination.[7]

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[6] Neither the EEOC nor the CCHR had investigated the plaintiff's charges when she requested her Right to Sue Letter.

[7] The claim of retaliatory discharge was not included in the charges filed by the plaintiff with the EEOC in 1984. However, this Court may exercise "jurisdiction...over all claims encompassed within the EEOC charge and like or related matters which might reasonably be expected to be subject to an EEOC investigation growing out of the charge." *Flesch v. Eastern Pennsylvania Psychiatric Institute*, 434 F. Supp. 963, 970 (E.D. Pa. 1977) (citations omitted). Further, the "rule is broad enough to include claims arising from new acts occurring during the pendency of the EEOC and reasonable related to or growing out of acts alleged in the charge." *Id.* The allegation of discriminatory discharge, which occurred after the plaintiff filed charges with the EEOC, is reasonable related to and flows from the original retaliatory discrimination claim filed with the EEOC. Therefore,

In February 1986, the plaintiff's grievance, challenging her discharge and other alleged adverse employment actions by The Times, proceeded to arbitration. The arbitrator was jointly selected by the parties. Both the plaintiff and The Times were represented by counsel. The plaintiff attended all of the sessions, testified under oath on her own behalf, and was cross-examined. During the course of arbitration proceedings, The Times presented documentary evidence demonstrating the extent of the plaintiff's disciplinary record. The arbitrator received this evidence without objection from the plaintiff's counsel.

On July 7, 1986, the arbitrator issued his decision, finding that the plaintiff's discharge for gross insubordination was for good and sufficient cause.[8] The arbitrator concluded as follows:

> If the August 5-6, 1985 incidents were viewed in isolation, discharge would clearly be an excessive penalty. For there would be no reason to blow Ms. Howard's actions out of proportion. The fact, however, is that the incidents do not stand alone. They must be viewed in the context of her overall record.
>
> This certainly was not Ms. Howard's first brush with managerial authority. She has been disciplined on a number of occasions in the last four years of employment. She was suspended in September 1981. She was suspended for two weeks in April 1984. She was suspended for four weeks in October 1984. (The suspension was later reduced to two weeks.) She has, in

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this Court will assert jurisdiction over the *pro se* plaintiff's charge of discriminatory discharge.

[8] The collective bargaining agreement specifies that a discharge, or any other challenged employment actions is permissible only upon "good and sufficient cause."

> addition, been issued a number of written warnings. The most recent was on March 4, 1985. At that time, she was clearly cautioned that if she was "guilty of any acts of insubordination in the future (she) will be instantly discharged." She was told then that if she objected "to any orders you will be expected to do the job and then file any grievances or complaints with (her) union representative."
>
> Ms. Howard, in short, has been subjected to progressive discipline. It was designed to correct her pattern of behavior at work. It has not proved successful. She simply has not responded well to the Company's corrective approach.
>
> The Company, in my view, had "good and sufficient cause" to discharge her. If I believed there was any likelihood that she had learned a lesson, that she would comport herself properly in the future, I would be inclined to direct she be reinstated. However, I am convinced that no such likelihood exists. Ms. Howard, in my judgment, is incapable of curbing herself. She seems unable or unwilling to comport herself as a responsible employee. Under the circumstances, I am constrained to conclude the company had "good and sufficient cause" to discharge her.

Decision of Arbitrator, pp. 19-20, annexed as Exhibit 7 to Affidavit of John Stanton.

After the arbitrator reported his decision, The Times moved for judgment on the pleadings in this action or, alternatively, for summary judgment. The defendant argues that the allegations of failure to promote in 1975 and demotion to index clerk in 1977 are barred by the statute of limitations. Further, The Times argues that it is entitled to summary judgment on the plaintiff's

remaining allegations because the plaintiff fails to establish the requisite elements of a claim of retaliatory discrimination.

Discussion

For an alleged act of discrimination to be actionable under Title VII, the act complained of must have occurred within 300 days of filing of charge with the EEOC. 42 U.S.C. § 2000e-5 (e) (1982). The failure to promote, which plaintiff alleges was discriminatory, occurred in 1975, while the alleged retaliatory demotion occurred in 1977. Both of these incidents are well outside the statute of limitations period, and are, therefore, dismissed as time barred.

The Times moves for judgment on the pleadings pursuant to Fed. R. Civ. P. 56. We treat this as a motion for summary judgment because matters outside the pleadings have been presented to the Court.

Initially, the party moving for summary judgment must demonstrate an absence of any genuine issue of material fact. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 106 S. Ct. 1348, 1355 n. 10 (1986). If this showing is made, the burden shifts to the non-moving party to come forward with specific facts showing a genuine issue of material fact. Although references drawn from the underlying facts must be viewed most favorable to the non-moving party, *Id.* at 1356-57, the mere existence of some alleged factual dispute will not defeat a motion for summary judgment. The facts in dispute must be material, i.e., facts that might affect the outcome of the suit under the governing substantive law. *Anderson v. Liberty Lobby, Inc.*, 106 S. Ct. 2505, 2510 (1986). Only if the non-moving party fails to present evidence that raises "a sufficient disagreement to require submission to a jury," may summary judgment be properly granted to the movant. *Id.* at 2512.

The Second Circuit recently held that summary judgment is available in discrimination suits brought under Title VII, even though there may be issues of intent. The summary judgment rule would become sterile if the mere incantation of "intent" operated to defeat an otherwise valid motion. *Meiri v. Dacon,* 759 F 2d 989, 998 (2d Cir. 1985). Further, the purpose of summary judgment is to avoid expensive and harassing trials, and a party opposing a motion for summary judgment risks the possibility there will be no trial if she save the evidence for trial. *Id.* at 998. Purely conclusory allegations of discrimination, absent any concrete particulars, are insufficient to defeat a motion for summary judgment. *Id.*

The last point noted above aptly describes the plaintiff's allegation that, in retaliation for filing the earlier charges of racial discrimination, The Times gave her a "bad reference." The plaintiff provides no details about this alleged incident, neither when it occurred nor to whom the information was supposedly given. The Times, however, presents affidavits stating that the only references it provides for former employees consist of employment dates and job title. Further, The Times, through affidavits, states that personnel records kept in the ordinary course of business indicate no request for a reference for the plaintiff. In response to this showing, the plaintiff's mere allegation of a bad reference fails to establish a genuine issue of material fact. Hence, The Times is entitled to summary judgment on the plaintiff's "bad reference" claim.

A claim of retaliatory discrimination is evaluated in three steps. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973). First, the plaintiff must establish a prima facie case of retaliatory Discrimination. If the plaintiff successfully raises an inference of retaliatory discrimination, the burden then shirts to the defendant to rebut that inference by articulating a legitimate, non-discriminatory reason for the challenged employment actions. Once this has been done, the plaintiff must

demonstrate that the articulated reasons are a mere pretext for discrimination.

1. *Prima facie* case.

To establish a *prima facie* case of retaliatory discrimination, the plaintiff must show that (a) she engaged in protected activity, such as filing discrimination charges against the employer; (b) the employer was aware of this; (c) the employer thereafter took some adverse action against her; and (d) a casual connection exists between her participation in the protected activity and the adverse employment action. *Grant v. Bethelehem Steel Corp.*, 622 F. 2d 43, 46 (2d Cir. 1980). *See Davis v. State University of New York*, 802 F. 2d 638, 642 (2d Cir. 1986). In the instant case, it is undisputed that, in 1975, the plaintiff filed charges of racial discrimination with the EEOC and the CCHR against The Times, the latter was aware of those charges, and adverse employment actions were taken. However, we question the adequacy of proof on the final element required for a *prima facie* case.

A casual connection between the protected activity and the alleged retaliatory action may be demonstrated by evidence of circumstances that justify an inference of a retaliatory motive, such as protected activity closely followed by adverse actions. *See Burrus v. United Telephone Co. of Kansas*, 683 F. 2d 339, 343 (10th Cir. 1982). However, the plaintiff's protected activity took place in 1975 and the alleged retaliatory discrimination occurred ten years later. In view of this span of time, the casual connection is broken unless the plaintiff has additional evidence to the contrary. The plaintiff has failed to make such a showing. Her conclusory allegations of retaliatory animus are insufficient to raise an inference of retaliatory discrimination and, therefore, a *prima facie* case has not been established. However, because the plaintiff appears *pro se*, we hesitate to dismiss her action on this facial in-sufficiency. We will, therefore, assume arguendo

that the plaintiff has established a *prima facie* case, and turn to the other considerations in evaluating her discrimination claim.

2. Defendant's rebuttal.

If we assume that the plaintiff has established a *prima facie* case, the burden shifts to the defendant to state a legitimate, non-discriminatory reason for its actions. The Times cites numerous incidents of disciplinary actions imposed on the plaintiff over a prolonged period of time. In September 1981, the plaintiff was suspended for three days without pay for insubordination; in October 1983, she received written disciplinary warning for remarks made about her immediate supervisor, Phyllis Colazzo; in November 1983, a disciplinary memorandum was sent to the plaintiff warning her that she would be dismissed if she continued making unprovoked outbursts and unsubstantiated charges; also in November 1983, she received a written disciplinary final warning directing her to follow office rules on pain of dismissals; in April 1984, the plaintiff was suspended without pay for insubordination; twice in August 1984, the plaintiff was reprimanded for leaving work early without permission; in October 1984, the plaintiff received the disciplinary warning memorandum and the two-week suspension that she challenges in the instant action; in January 1985, the plaintiff received a disciplinary warning for disobeying office rules; in February 1985, a meeting attended by the plaintiff, The Guild, and The Times, she was given a final disciplinary warning, and received a written confirmation of it in March 1985; and, finally, on August 6, 1985, the plaintiff was discharged for gross insubordination.

In addition to the plaintiff's disciplinary record, the defendant cites the decision of the arbitrator as evidence that its actions were legitimate and non-discriminatory. While we are not bound by the arbitrator's decision, it is admissible as evidence and may be accorded such weight as the Court deems appropriate.

Alexander v. Gardner-Denver Co., 415 U.S. 36, 60 (1974) We find compelling the arbitrator's decision that the plaintiff was dismissed for cause and not for reasons of discrimination. We further conclude that it adds great weight to the other documentary evidence submitted by The Times.

3. Showing of pretext by plaintiff.

To the extent the defendant, as here, substantiates a legitimate, non-discriminatory reason with a factually supported basis, such as documentary evidence, the plaintiff's task of showing pretext will be more difficult. *See Wade v. New York Telephone Co.*, 500 F. supp. 1170, 1178 S.D/N.Y. 1980). In *Wade*, the defendant employer's articulation of a legitimate, non-discriminatory reason for the alleged acts of racial discrimination were factually supported with affidavits, an arbitral decision, and an EEOC determination that there was no reason to conclude the plaintiff's allegations were true. The plaintiff did not submit any proof or even allude to how she hoped to prove pretext at trial and, consequently, her mere conclusory allegations failed to overcome the defendant's showing. Similarly, while plaintiff Howard states that she "will try to prove to the court that her charges are true and correct." Plaintiff's Reply filed November 7, 1986, at 1, she does not even allude to how she intends to prove pretext, other than to say she will "present testimony to substantiate her claim." Plaintiff's Reply filed November 25, 1986, at 3. She has, therefore failed to meet her burden of demonstrating that the defendant's articulated reasons are a mere pretext for discrimination.

The plaintiff's claim was unsuccessful in the arbitration proceeding and she presents no new evidence or facts in opposition to this motion for summary judgment. She attempts, as she did in the arbitration proceedings, to support her claim of retaliatory discrimination with conclusory allegations. She has not come forward with specific facts demonstrating a genuine issue of material fact for trial. Accordingly, the defendant is entitled to summary judgment.

Conclusion

In summary, we dismiss as time barred the plaintiff's allegations regarding the defendant's failure to promote her in 1975 and her "demotion" to the position of index clerk in 1977. We grant summary judgment for the defendant on the plaintiff's claim of being given a 'bad reference,' since no facts were put forth to establish a genuine issue of material fact. We further grant the defendant's motion for summary judgment on the plaintiff's claims of retaliatory discrimination because, even if the plaintiff has established a *prima facie* case, which is dubious, she fails to overcome the defendant's articulation of legitimate, non-discriminatory reasons for its actions. The Clerk will enter judgment for defendant.

SO ORDERED.

Dated: White Plains, N.Y.
March 27, 1987

GERARD L. GOETTEL
U.S.D.J.